

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Natalie Bocanegra, Commission Counsel
John Wallace, Assistant General Counsel
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Date: November 25, 2002

Subject: **“Public Generally” Exception for Small Jurisdictions: Second Pre-notice Discussion of Amendment to Regulations 18707.1 or 18707.3 or Repeal of Regulation 18707.3**

I. ISSUE

Representatives of a number of small jurisdictions have stated that the current version of the small jurisdiction exception, a special “public generally” rule provided at regulation 18707.3, is rarely applicable due to recent amendments. Specifically, they state the replacement of the “300-foot rule” with a “500-foot rule” causes this exception to be too restrictive. These representatives explain that this result occurs due to the increased radius for determining certain¹ conflicts of interest; the new radius frequently encompasses much of a small jurisdiction.

II. SUMMARY

The Commission is asked to consider whether any of the following regulatory actions should be taken to address this issue:

OPTION A: Delete the small jurisdiction exception and require that small jurisdictions apply the general “public generally” rule, without amendment.

Due to regulatory changes resulting from the 2001 Phase 2 Conflict of Interest Improvement Project, the small jurisdiction regulation may no longer be necessary. The small jurisdiction exception applies only when the official’s property is more than 500 feet from the property that is the subject of the decision. After Phase 2, an official is presumed to have no conflict of interest when his or her residence is located more than 500 feet from the subject property. Consequently, a public official need not even go to a “public generally” rule when his or her property is beyond 500 feet.

This option thus more accurately reflects the law after Phase 2. However, it does nothing to ameliorate the supposed harshness of the “500-foot rule” in small jurisdictions. Staff

¹ The types of conflicts of interests at issue are those arising from an official’s real property interest.

nonetheless supports this option because the general “public generally” rule, along with the “legally required participation” rule, offers sufficient relief to officials in small jurisdictions.

OPTION B: Amend regulation 18707.3, the small jurisdiction exception.

A number of amendments, based on a request by the Town of Yountville, are presented, which includes changing the “500-foot rule” to a less restrictive “300-foot rule” to be used in the small jurisdiction exception. Other decision points address the criteria for status as a “small jurisdiction,” eliminating the “no direct effect” rule, altering the required distance in which 100 properties under separate ownership must be located, and modification of the “substantially similar” test.

Option B differs from Option A in that it would retain the small jurisdiction exception in some form with several possible amendments expanding this exception. Due to enforcement concerns, staff offers no recommendation on Option B and rather, finds Option C, below, preferable to this option if the Commission wants to keep the small jurisdiction exception. Staff has provided comments under each Option B decision point should the Commission decide to retain and amend the small jurisdiction exception.

OPTION C: Delete the small jurisdiction exception and amend regulation 18707.1, the general “public generally” rule, to include provisions that specifically apply to small jurisdictions.

Option C differs from Option A by retaining a special rule that can be applied to small jurisdictions. Option C language is meant to be substantively the same as Option B language except that this approach eliminates the “no direct effect” requirement currently contained in regulation 18707.3 to better conform with the general “public generally” rule. Under the proposed language, a “significant segment” is formed by at least 100 properties which meet certain requirements. The “substantially the same manner” prong is met if:

- 1) A majority of residential properties which are within a certain distance from the subject property are affected in a similar manner; and
- 2) The official’s property is of a certain size and cannot be further subdivided.

Under this approach, an official in a small jurisdiction would continue to be free to apply the general rule, but could also apply this alternate small jurisdiction analysis. Staff supports this option if the Commission determines that the small jurisdiction exception should be retained and amended.

III. INTRODUCTION

Commission regulations permit a public official who has determined that he or she has a conflict of interest to participate in a decision if the “public generally” exception applies. The “public generally” exception contains a general rule which is provided at regulation 18707.1, followed by specific rules which apply to particular circumstances. One of these specific rules pertains to small jurisdictions (regulation 18707.3) and applies to conflicts of interest arising from real property which serve as a public official’s personal residence.

In December 2001, Commission staff attended a League of Cities meeting to discuss the small jurisdiction exception with representatives from a number of small cities.² The Town of Yountville subsequently submitted proposed amendments to the small jurisdiction exception. Additional cities which submitted written comments on this issue were Plymouth, San Pablo, and St. Helena.

The Commission heard pre-notice discussion on this issue at its September 2002 meeting. At that time, the Commission was presented with draft regulatory language based on Yountville's proposal. Discussion centered on whether it was desirable to allow officials in small jurisdictions to participate in conflict-of-interest decisions when officials in other jurisdictions were disqualified. The Commission additionally considered the possibility of addressing the small jurisdiction issue in regulation 18704.2, the regulation which provides the rules for determining whether real property is directly or indirectly involved in a decision. Staff was directed to continue exploring possible amendments to the small jurisdiction regulation in addition to looking at how the general "public generally" rule could be applied to small jurisdictions. Members of the Commission also expressed a desire to hear from other community members on this issue. A press release explaining this topic, announcing the Commission's December 2002 meeting, and requesting public comment was issued during early November to Yountville area newspapers, radio, and other media.

IV. DISCUSSION

A. Current "Public Generally" Rules

As noted above, application of the "public generally" exception is triggered only once a public official determines that he or she has a conflict of interest in a decision. With regard to real property interests, regulation 18707.1 provides:

“(a) Except as provided in Government Code sections 87102.6 and 87103.5, the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally if both subdivisions (b)(1) and (b)(2) of this regulation apply.

(b) Significant Segments and Indistinguishable Effects.

(1) Significant Segment. The governmental decision will affect a 'significant segment' of the public generally if any of the following are affected as set forth below:

¶...¶

(B) Real Property. For decisions that affect a public official's real property interest, the decision also affects:

(i) Ten percent or more of all property owners or all homeowners in the jurisdiction of the official's agency or the district the official represents; or

² Yountville, Emeryville, Carpinteria, Willits, Del Mar and Calistoga attended this meeting.

(ii) 5,000 property owners or homeowners in the jurisdiction of the official's agency.

¶...¶

(E) Exceptional Circumstances. The decision will affect a segment of the population which does not meet any of the standards in subdivisions (b)(1)(A) through (b)(1)(D), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.

(2) Substantially the Same Manner: The governmental decision will affect a public official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation."

This general "public generally" exception will apply in any situation where a public official can show that the decision will affect his or her real property in substantially the same manner as the decision will affect a significant segment (i.e., 10% or 5,000 of certain property owners or homeowners) of the public generally.

In contrast, current regulation 18707.3, the "public generally" rule which applies to small jurisdictions, provides:

"(a) The effect of a governmental decision on the principal residence of a public official is not distinguishable from the effect on the public generally where all of the following conditions are met:

(1) The public official's agency has jurisdiction over a population of 25,000 or less.

(2) The decision does not have a direct effect (as provided in Title 2, California Code of Regulations, section 18704.2(a)) on the real property that serves as the public official's principal residence.

(3) The real property that serves as the public official's principal residence is more than 500 feet from the boundaries of the property which is the subject of the decision.

(4) There are at least 100 properties under separate ownership which are within a 2,500-foot radius of the boundaries of the property which is the subject of the decision.

(5) The principal residence is located on a parcel of land not more than one acre in size, or which, under the zoning and subdivision regulations of the jurisdiction in which it is located, cannot be further subdivided.

(6) The effect of the decision on the official's real property interest will be substantially the same as the effect of the decision on the majority of the residential properties which are beyond 500 feet, but within 2,500 feet of the boundaries of the real property that is the subject of the decision.

(b) For purposes of this regulation, ‘principal residence’ means the domicile of a person, in which the person’s habitation is fixed, wherein the person has the intention of remaining, and to which the person, whenever he or she is absent, has the intention of returning. At any given time, a person may have only one principal residence. With respect to units in condominium complexes, planned unit developments, and similar residences, ‘the real property that serves as the public official’s principal residence’ and ‘principal residence,’ as used in this regulation, means the unit or space in which the official has a separate ownership interest.”

As pointed out in the August 23, 2002, memorandum to the Commission, regulation 18707.3 has always been limited to situations where the official’s real property is indirectly involved in the governmental decision. The regulation was amended in 2001 so that where the official’s property is within 500 feet of the subject property, as opposed to 300 feet, this small jurisdiction exception *will never* apply. However, under the materiality rules as they were amended in 2001, if the official’s residence is not within 500 feet, it is presumed that the official’s property will not be materially affected absent evidence of specific circumstances that make it reasonably foreseeable that the decision will have a material financial effect on the official’s property. (Regulation 18705.2(a)(1).)

As a result, it is only necessary to apply the small jurisdiction exception where the official’s residence is beyond 500 feet *and* there is proof of specific circumstances that make it reasonably foreseeable that the decision will have a material financial effect on the official’s residence. (Regulation 18705.2(b)(1).) In addition, a public official with a conflict of interest arising because his or her property is within 500 feet of the subject property can always turn to the general “public generally” rule if the requirements of regulation 18707.3 cannot be met. For example, in the *Troedsson* Advice Letter, No. A-01-172³, the general “public generally” exception of regulation 18707.1 applied to a floodwall decision before Mayor Holt of Yountville.⁴ The letter concluded that Mayor Holt was permitted to vote in a floodwall decision since the effect of the decision on the mayor’s property was not distinguishable from the effect on the public generally. Specifically, this letter advised:

“You have provided statistics as outlined above in step three, correlating the amount of each expected effect as it relates to the effect expected by the mayor. These figures are the same as those already listed above regarding the percentage of homeowners or property owners affected by each factor. From the facts provided, it would appear that the mayor would experience effects from the governmental decision in substantially the same manner as at least 11% of the property owners within the jurisdiction. If these figures are correct, then the effect of the decision is not distinguishable from the effect on the public generally, and the mayor may participate in the decision regarding the floodwall.”

³ This is the second of two advice letters issued regarding Mayor Holt’s participation in the floodwall decision.

⁴ The small jurisdiction exception of regulation 18707.3 did not apply since the mayor’s property was within 500 feet of the subject property and, therefore, directly involved in the decision.

Consequently, the general “public generally” rule provided in regulation 18707.1 allowed Mayor Holt to participate in the decision.

B. Relief for Small Jurisdictions

1. Purpose of Small Jurisdiction Regulation

The small jurisdiction exception was adopted by the Commission to provide an alternate manner in which public officials in small jurisdictions could participate in decisions despite a conflict of interest arising solely from their personal residence. This regulation was meant to serve as a narrow exception that would apply solely to principal residences. For example, a December 1995 notice to the Office of Administrative Law announcing a public hearing on amendments to the regulation explained that subdivisions (a)(4) and (a)(6) added two new requirements:

“In place of the narrowing factors that would be deleted,⁵ we are proposing two new requirements that are consistent with the “public generally” concept set forth in the statute. First, new subdivision (a)(4) would require that more than just a few properties be owned by separate persons within a 2,500-foot radius of the boundaries of the subject property. In other words, if the official is the only home owner (or one of few) within 2,500 feet of the site, the “public generally” exception would not apply....In addition, subdivision (a)(6) has been added which is the core of any “public generally” exception – that the official be affected in the same manner as a large segment of the public. In this case, we are requiring that the official be affected no differently than the decision will affect the other residential properties within approximately the same distance of the project site....” [Footnote added.]

Consequently, application of this exception is currently limited to cities with certain populations and densities⁶ resulting in application of the exception only where the official’s principal residence is affected in substantially the same manner as a significant segment of the public. However, the test contained in the small jurisdiction regulation includes criteria different from the “significant segment” and “substantially the same manner” tests of the general rule. In fact, the criterion of 100 properties within a 2,500 feet radius may frequently result in an effect much less than on 5,000 or 10% of the property owners/homeowners in a jurisdiction depending on the jurisdiction’s characteristics.

⁵ The factors referred to were requirements that the public official reside within the jurisdiction and that the public official, if elected, was elected in an at-large election.

⁶ In order to meet the “100 properties” test of subdivision (a)(4), the area formed by the 2,500-foot radius would never be able to encompass properties, provided they are of equal size, larger than 4.5 acres. This results because the area of a circle with a 2,500-foot radius is approximately 19,625,000 square feet, and this area divided by 100 is 196,250 square feet or approximately 4.5 acres.

2. Phase 2 Changes

As part of its Phase 2 Conflict of Interest Improvement Project in 2001, the Commission undertook revision of a number of regulations including the “public generally” regulations. Under the pre-Phase 2 rules, the small jurisdiction exception never would have applied to an official’s residence located within the 300-foot distance (just as the exception currently does not apply when the residence is within 500 feet). Rather, under the old rules, the exception would have been applied only when an official’s residence was located more than 300 feet from the subject property but within 2,500 feet, a zone in which it was almost always unclear whether a conflict of interest existed.

It is possible that the elimination of this middle zone or “gray area” may have also eliminated the need for the special small jurisdiction rule since now a public official with any property beyond 500 feet (formerly 300 feet) is presumed *not* to experience a material financial effect from a particular decision.

3. Concern of Small jurisdictions

A number of small jurisdictions, however, have stated that the distance of 500 feet creates too many conflicts of interest for public officials in their jurisdictions. At the September 2002 Commission meeting, Karin Troedsson, Deputy Town Attorney for the Town of Yountville, stated that Yountville’s town council frequently cannot get a quorum vote on items in the commercial area, either because of the 500-foot rule or source of income issues.⁷

Additionally, in a letter to the Commission, she highlighted what officials of small jurisdictions feel is a significant problem:

“Small Jurisdictions like ours do not have the financial resources to continually write lengthy letters to the FPPC or to obtain professional appraisals to help the public officials make factual determinations required under the public generally analysis.” (Troedsson, April 8, 2002 letter.)

Yountville believes that reducing the 500-foot rule to 300 feet would help alleviate these problems confronting small jurisdictions.

4. Legally Required Participation

The Act does recognize that there may be instances in which an agency cannot function without the participation of a public official who has a conflict of interest pursuant to section 87100. Another narrow exception to the conflict-of-interest rules provided at section 87101 provides:

⁷ Because source of income issues are beyond the scope of the regulatory proposals relating to the small jurisdiction-principal residence exception submitted by the Town of Yountville, they are not addressed herein.

“Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made”

This “legally required participation” rule always remains available to officials in any size jurisdiction where a quorum cannot be convened due to disqualification, as provided above; a governmental body is never prevented from making a decision due to the lack of a quorum. It is unclear whether this exception has been sufficiently applied to remedy the concerns raised.

C. Proposed Changes

OPTION A: Delete the small jurisdiction exception and require that small jurisdictions apply the general “public generally” rule, without amendment.

Discussion/Staff Recommendation: Due to regulatory changes resulting from Phase 2, it is possible that the small jurisdiction regulation is no longer necessary. As opposed to pre-Phase 2 rules, an official is presumed to have no conflict of interest when his or her residence is located more than 500 feet from the subject property. As a result, a public official need not even go to a “public generally” rule when his or her property is beyond 500 feet.

As noted above, in situations where the official’s residence is within 500 feet of the subject property or in some other way is directly involved in the decision, the official may still apply the general “public generally” rule provided at regulation 18707.1.

The Enforcement Division is concerned with expanding the small jurisdiction regulation to apply to an official’s principal residence located within the area in which the official’s property is presumed to experience a material financial effect. The Enforcement Division explains:

“The general rule for the public generally exception and the special rule for the principal residence exception in small jurisdictions are working. The Enforcement Division is not aware of any instance where a public official was disqualified from voting or was prosecuted for voting where we felt the public official should have been allowed to vote.

If the Commission adopts the changes to the public generally rules as the Town of Yountville is requesting, officials in small jurisdictions will be allowed to vote on matters that their counterparts in larger jurisdictions would not be allowed to vote on. In addition to the obvious inequities of such a rule, there are unintended, but predictable consequences. Enforcement has a great deal of concern that adopting these changes will lead to an erosion of the conflict-of-interest rules, as officials in larger jurisdictions argue to be treated the same as public officials in small jurisdictions.

The principal residence exception in small jurisdictions was enacted to address a specific problem, in much the same manner as the industries, trade, or

professions exception. Since, in order to hold elective office, an elected official is required to be a resident of that jurisdiction, and most officials own their homes, the official's principal residence was exempted as a basis for disqualification under certain limited circumstances. No such rationale exists for the changes requested by Yountville.

Yountville is asking the Commission to expand the principal residence exception to all real property interests. The justification for such a request is that Yountville does not have the resources to do a public generally analysis. The public generally analysis does not seem that complex. Is Yountville contending that a city does not know and cannot determine how many property owners or homeowners there are in its jurisdiction, and within a 500-foot radius of any governmental decision? Is Yountville contending that a city cannot ascertain if any governmental decision will have substantially the same financial effect on the official's property as it will have on other properties in the affected area?

Enforcement's opposition to the proposed changes can best be summarized as follows. If there is a problem in the public generally analysis, the solution is to make the analysis easier to apply. The remedy is not to allow officials with conflicts to participate in the governmental decision making process, simply because these officials reside in small jurisdictions."

Despite these concerns, a number of points raised by the town of Yountville are accurate; the Phase 2 regulatory changes have greatly decreased the applicability of the small jurisdiction exception. Adoption of Option A would implement a Commission determination that the small jurisdiction exception is no longer necessary as a result of the Commission's Phase 2 decision to base the real property direct effects/materiality standard on a 500-foot demarcation rather than a 300 - 2,500-foot demarcation.

OPTION B: Amend regulation 18707.3. The proposed amendments include draft language previously presented to the Commission in addition to new options based on prenotice discussion. These new options include:

- Option to delete the requirement that there be no direct effect on the official's property
- Option to decrease the population requirement to 10,000
- Option to keep the 100 properties requirement with new standards
- Option to apply the exception to all real property of an official

Except for the technical amendments described under Decision 3A – 3C discussion, staff does not provide a recommendation for Option B. However, the following discussion contains recommendations with regard to each decision point under this option.

Subdivision (a)(1)***Decision 1: Should the population threshold be decreased from 25,000 to 10,000?***

At its September meeting, the Commission expressed interest in possibly reducing the 25,000-population threshold to 10,000 as a way of offsetting a potential loosening of the current requirements by increasing the 300-foot radius to 500 feet. As mentioned, 49% of California cities currently have populations of 25,000 or less. Changing the population criterion in this manner would reduce by about 100 the number of cities that would be considered “small jurisdictions” for purposes of regulation 18707.3. The following information illustrates the number of cities with varying population sizes:

- 236 cities have a population of 25,000 or less
- 177 cities have a population of 15,000 or less
- 124 cities have a population of 10,000 or less

(Figures based on data from *California Planners' Book of Lists*, Governor's Office of Planning and Research, 2001.)

Staff recommends that, if this exception is expanded by reducing the 500-foot limit to a 300-foot limit under **Decision 3C** (see below), the population standard should be adjusted to 10,000 or less.

Decision 2: Should cities that exceed the population threshold of the regulation be able to use the regulation if they are of relatively compact size?

Proposal Based on San Pablo Comments: The City of San Pablo requests that the regulation be amended to apply to either cities of small population or cities of compact geographic area to read:

“The public official’s agency has jurisdiction over a population of 25,000 or less [or encompasses a geographic area of [1/2/3] square miles or less].”

Discussion/Staff Recommendation: The amendment of subdivision (a)(1) would provide an alternative to the population requirement that must be met before the small jurisdiction exception can be applied. The original version of the current regulation was more restrictive as it contained both a population *and* geographical requirement. The original 1990 version of the regulation read:

“(1) The public official’s agency has jurisdiction over a population of 25,000 or less, *covering a geographic area of ten square miles or less.*” [Emphasis added.]

The additional geographical requirement was deleted in 1996. Reasoning for this deletion was as follows:

“The original intent behind this requirement was to keep the regulation narrow. The 1989 memorandum in support of Regulation 18703.1 stated that

jurisdictions with large land areas would be less likely to have multiple conflicts of interest in a decision because their officials will generally be spread out in contrast to those officials in compact jurisdictions....Thus, there was no apparent need for the regulation in cities with larger land areas.

However, in cases such as Indian Wells, while the land area is larger than that of many small cities, because of geographical limitations, most of the population is still centralized in a smaller area. Thus, the land area requirement appears to be unduly restrictive.”

The City of San Pablo raises a concern with regard to the (a)(1) population requirement. Because its population is about 30,000, San Pablo cannot avail itself of the small jurisdiction exception even though they contend that “San Pablo is a ‘small jurisdiction’ in every sense of the word.” The city states that the 500-foot rule has even more of an exclusionary effect in cities the geographic size of San Pablo (2.6 square miles) as opposed to cities with less population but greater geographic size. For this reason, Decision 2 presents an alternative to the population requirement by allowing a jurisdiction to qualify for the small jurisdiction exception on the basis of its small geographic size. Including this geographic alternative would broaden the application of the “public generally” exception for small jurisdictions.

The draft language presents the options of 1 - 3⁸ square miles.⁹ The following information illustrates how many cities (out of 477 cities) in California would qualify as small jurisdictions under each of these options:

- 38 cities (8%) have an area of 1 square mile or less
- 84 cities (18%) have an area of 2 square miles or less
- 117 cities (25%) have an area of 3 square miles or less

(Figures based on data from *California Planners’ Book of Lists*, Governor’s Office of Planning and Research, 2001.)

While adding a geographic alternative for qualification as a small jurisdiction could solve the problem raised by San Pablo, such an alternative would broaden the exception by expanding application of the regulation to more cities. Currently, about 49% (236) of California cities have a population of 25,000 or less (*Ibid.*) and are considered “small jurisdictions.”

The following numbers of cities do not currently meet the population criterion, but would meet one of the proposed square mileage criteria:

- If the area of 1 square mile is selected: 1 city not previously eligible would qualify
- If the area of 2 square miles is selected: 5 cities not previously eligible would qualify
- If the area of 3 square miles is selected: 12 cities not previously eligible would qualify

⁸ After additional consideration, staff has reduced the square area options to 1-3 square miles as 4 square mile language would allow 20 cities, not previously eligible, to apply the exception and would result in approximately 54% of cities being eligible for this exception.

⁹ 500 feet equates to approximately .095, or one tenth, of a mile.

Staff Recommendation: Upon further consideration of this geographic proposal, staff recommends against including an alternate geographic criterion. Because the “significant segment” analysis of the “public generally” exception is based on a population (property owner/homeowner) standard, adding a geographic criterion would deviate from the Commission’s other “public generally” rules. If the Commission decides to adopt an alternate geographic criterion, staff recommends the 1 square mile option to keep this regulation sufficiently narrow.

Subdivision (a)(2)

Decision 3A: Should the “public generally” exception applicable to small jurisdictions continue to apply only in instances where the decision does NOT have a direct effect on the public official’s residence?

Regulation 18707.3 may not be used in any case where the decision has a direct effect on the official’s residence pursuant to the following provision of subdivision (a)(2):

“(2) The decision does not have a direct effect (as provided in Title 2, California Code of Regulations, section 18704.2) on the real property that serves as the public official’s principal residence.”

Proposal Based on Yountville Comments: Delete provision 18707.3(a)(2).

Discussion/Staff Recommendation: Staff does not support deletion of (a)(2) to allow an official to participate in decisions in which the official’s residence is directly involved in the decision. Deletion of this subdivision would expand a narrow exception which uses a relatively low standard for its “significant segment” already. The Enforcement Division has also expressed strong reservations to such an amendment. As discussed earlier, officials in small jurisdictions are not without recourse since a presumption of materiality (and a resulting conflict of interest) can be rebutted if requirements of the general “public generally” rule are met. Additionally, an agency in a small jurisdiction should never find itself lacking a quorum due to the conflict-of-interest rules since the “legally required participation” rule may be invoked.

Subdivision(a)(3)

Decision 3B: Should 500-foot distance in subdivision (a)(3) be reduced to 300 feet?

Proposal Based on Yountville Comments: Reduce the 500-foot distance to 300 feet to create a less restrictive standard.

“(3) The real property that serves as the public official’s principal residence is more than [*Decision 3B*] [500] [300] feet from the boundaries of the property which is the subject of the decision.”

No change to this subdivision is consistent with the retention of the “direct test” rule discussed above. The effect of the textual change shown above would allow application of this exception in instances where the official’s residence is deemed to be materially affected. Reducing the 500-foot distance to 300 feet would decrease the area in which a public official with a conflict of interest is prohibited from applying the small jurisdiction exception by approximately 64%. (See Attachment 4.) If the Commission determines under Decision 3A to delete subdivision (a)(2) of the regulation, the Commission may retain subdivision (a)(3) with no change, or with a change to reduce the 500-foot rule to 300 feet.

If this distance is reduced and the direct involvement rule of (a)(2) is retained, staff proposes a conforming amendment to subdivision (a)(2) of the regulation to specifically refer to subdivisions (a)(1) – (a)(5) of regulation 18704.2¹⁰ as follows:

“(2) The decision does not have a direct effect (under Title 2, California Code of Regulations, sections 18704.2(a) [(1) – (5)]) on the real property that serves as the public official’s principal residence.”

Regulation 18704.2 provides that property is directly involved in certain types of zoning, permit, tax/fee, redevelopment, and improvement of services decisions or if it is within 500 feet of the subject property. The 500-foot rule is contained in the introductory language of 18704.2(a). Specifying subdivisions (a)(1)-(5) as noted above would eliminate a reference to the 500-foot distance rule which would be necessary if the distance is reduced from 500 to 300 feet.

Discussion/Staff Recommendation: For the reasons stated above, staff supports keeping the current language of subdivision (a)(3). If, however, the distance is reduced to 300 feet, then conforming changes should be made to subdivision (a)(2) as discussed above.

Subdivision (a)(4)

Decisions 4A – C: Should application of the regulation only be permitted where there are at least 100 properties which are located a certain distance from the subject property or which are the subjects of the decision themselves?

Subdivision (a)(4) currently requires that:

“There are at least 100 properties under separate ownership which are within a 2,500 foot radius of the boundaries of the property which is the subject of the decision.”

Proposed Amendments: Under **Decision 4**, the Commission may keep or delete this requirement. **Decision 4A** would maintain the current language. **Decision 4B** would change the 2,500-foot distance to a distance equal to the

¹⁰ Please be aware regulation 18704.2 is the subject of amendment and will be presented to the Commission in January. If regulation 18704.2 is renumbered, staff will make any necessary conforming changes to regulation 18707.3 prior to its scheduled adoption.

distance the official's property is located from the subject property. **Decision 4C** would require that 100 properties be the subject of the decision.

“(4) **Decision 4** [There are at least 100 properties under separate ownership which are **Decision 4A**][within a 2,500 foot radius of the boundaries of the property which is the subject of the decision.] **Decision 4B** [located within the same radius from the boundaries of the property which is the subject of the decision as the public official's property is located.] **Decision 4C** [the subject of the decision.]”

Discussion/Staff Recommendation: Staff recommends that subdivision (a)(4) be retained (**Decision 4**). Deleting this provision would reverse the Commission's prior determinations that the small jurisdiction exception be given a narrow construction. Furthermore, this criterion is a necessary component which helps to identify the relevant significant segment.

The 2,500-foot distance was based on prior real property materiality standards of regulation 18705.2 which included the distance of 2,500 feet. In 1988, the Commission determined that this distance was a substantial distance beyond which only specific circumstances causing a material financial effect on the official's property would matter for purposes of disqualification. (Memorandum to the Commission, “Adoption of Proposed Materiality Regulations,” July 14, 1988.) **Decision 4A** asks the Commission whether the current 2,500-foot radius should be retained.

If the Commission determines that the 2,500-foot rule is no longer relevant and wishes to eliminate this distance, staff would recommend using an alternate criterion. **Decision 4B** language presents an alternate way of ensuring that a sufficient number of properties are located in the area around the official's property.

Decision 4C presents a different standard using a “subject of the decision” analysis. Under this language, the public official would have to identify the properties which would be the subject of the decision and then determine whether there were a high enough number to comprise 100 properties. This option does not focus on any particular radius, rather it focuses on all properties affected.

Subdivision (a)(6)

Decision 5: Should the area in which the majority of similarly affected properties must be located continue to be bounded by a 300-foot and a 2,500-foot distance?

Proposal:

“The effect of the decision on the official's real property interest will be substantially the same as the effect of the decision on the majority of the residential properties **Decision 5: choose Decision**

4A or 4B distance] [Decision 4A] within a 2,500 foot radius of the boundaries of the property which is the subject of the decision.
[Decision 4B] [located within the same radius from the boundaries of the property which is the subject of the decision as the public official's property is located.]

Discussion/Staff Recommendation: As discussed above, this subdivision provides a criterion which serves to define “substantially similar manner.” Specifically, this provision identifies which properties count in assessing whether the effect on official’s property is indistinguishable from the effect on the public generally. If the Commission decides to replace the 2,500-foot standard in subdivision (a)(4), the Commission may also wish to replace the distance in subdivision (a)(6) as shown above to include either the language under Decision 4A or Decision 4B for purposes of consistency.

Decision 6: Scope Issue: Should the small jurisdiction exception be expanded to include all real property interests?

The Town of Yountville has proposed that regulation 18707.3 be expanded to apply to any type of real property interest rather than only an official’s principal residence. If the Commission decides to apply the regulation to all real property interests, subdivisions (a), (a)(2)-(3), and (a)(5) would be amended to replace references to an official’s principal residence and instead refer to any real property interest. For example, the following alternate language for subdivision (a) would be amended to read:

“The effect of a governmental decision on the real property of a public official is not distinguishable from the effect on the public generally where all of the following conditions are met....”

Additionally, subdivision (a)(6) would need to be amended by deleting the term “residential,” and subdivision (b) would no longer be required and should be deleted.

Discussion/Staff Recommendation: Staff does not recommend expanding this exception to apply to any type of real property interest. The small jurisdiction exception was devised to contend with the situation where public officials in a small jurisdiction were frequently unable to participate in decisions due to conflicts of interest arising from real property interests in their primary residences. Since, in order to hold elective office, an elected official is required to be a resident of that jurisdiction, the official’s principal residence was frequently the basis for an official’s conflict of interest. To apply regulation 18707.3 to conflicts of interest arising from *all* real property interests would, in effect, create a new exception. Staff recommends that, if the Commission does wish to change the small jurisdiction exception so that it applies to all real property interests, the general “public generally” rule be used as the vehicle to implement this regulatory change. This approach is presented in Option C.

OPTION C: Delete the small jurisdiction exception and amend regulation 18707.1 to include provisions that specifically apply to small jurisdictions.

Option C incorporates the small jurisdiction regulation into the general “public generally” regulation. The language is meant to be substantively the same as the Option B language except that this approach eliminates the requirement that the “decision does not have a direct effect” on the official’s property in order to be consistent with the general “public generally” rule. The structure of the small jurisdiction exception as presented in this form may be useful since it flows with the two-pronged analysis of the general rule by addressing separately the “significant segment” and “substantially similar” issues as follows.

Under the proposed language, a “significant segment” is formed by at least 100 properties under separate ownership which are within a certain area (Decision 4A or 4B) or are “subject of the decision” (Decision 4C). (Proposed subdivision (b)(1)(C).)

The “substantially the same manner” prong will be met if:

- 3) A majority of residential properties which are within a certain distance (Decision 4A or 4B) from the subject property are affected in a similar manner; and
- 4) The official’s property is of a certain size and cannot be further subdivided. (Proposed subdivision (b)(2)(A).)

Subdivision (c) defines the term “principal residence” as it is currently defined in regulation 18707.3, with minor changes. The term “person” is replaced with the term “official.”

Under this proposed language, an official would still have to determine whether the decision will affect the significant segment in substantially the same manner as it will affect the official’s property. Using this approach, a public official in a small jurisdiction would continue to be free to apply the general rule, but could also choose to apply this alternate small jurisdiction analysis.¹¹ If the Commission determines that amendments to the small jurisdiction exception are desirable, staff supports inclusion of this exception in regulation 18707.1.

Attachments

¹¹ Note that in order to apply either the general rule or the small jurisdiction rule, an official must identify the property owners of parcels in the relevant area. Many jurisdictions use county assessor’s tax roles as sources of information.